**UDACHIN DEVELOPMENT SDN. BHD.**

**v.**

**DATIN PEGGY TAYLOR**

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO: 251 OF 1983]
2 MAY 1984

***CONTRACT:*** *Claim for remuneration - Services rendered by architect - Computation of fees payable - Date of abandonment - Whether relevant - Partial services rendered - Test to be applied - Revised cost estimates - Whether applicable - Fees and charges included in contract price - Whether to be excluded - Sum awarded - Whether excessive and unreasonable.*

***PROFESSIONS:*** *Architects - Computation of abandonment fee - Basis of a chartered architect and sole proprietor.*

Datuk Eric Taylor, a chartered architect and sole proprietor of an architect firm, claimed by a specially indorsed writ against his client Udachin Development Sdn. Bhd. ("Udachin") the sum of RM687,500 as abandonment fee for professional services rendered in respect of a project in Kuala Lumpur. A scheme of payment was set out in the letter dated 29 October 1974 confirming the architect's appointment and setting out the agreed professional fees. The architect also claimed, in the alternative, for the said sum upon a *quantum meruit* for work done. As a result of his death before the hearing of the case, the further conduct of the suit was by order of Court given to his widow Datin Peggy Taylor as personal representative of his estate. The trial Judge found for the estate of the architect. He found the date of abandonment to be 27 November 1975. He adopted the fifth revised cost estimate of RM35.029 million (Exh. P32) dated 20 January 1975, in preference to the seventh revised cost estimate (Exh. D45) of RM25.457 million, dated 12 January, 1976, as the basis of computing the full fee due to the architect. Both cost estimates were prepared by the same firm of quantity surveyors employed by Udachin. The Judge, holding that the contract (Exh. P14) was subject to Malaysian Institute of Architects (MIA) Rules, applied the Conditions of Engagement and Scale of Professional Charges of MIA and awarded partial remuneration or abandonment fee of 2/3rd of the full fee, which was 3¾% of the estimated cost provided in P32. Judgment was given for the sum of RM685,745.50. The appellant appealed, but only against the computation of the full fee.

**Held:**

**[1]** The Judge's findings regarding the date of the abandonment of the project by Udachin were contradictory. It was clear that the architect continued to give professional services in 1976.

**[2]** However, as it was now conceded by Udachin that Clause 3 of MIA Rules should be imported into P14 for the purpose of computing abandonment fees, abandonment was not really relevant or vital for the determination of the dispute. What was important for the purpose of ascertaining the partial remuneration or abandonment fee was the actual measure of partial work that had been carried out by the architect for Udachin in the building project.

**[3]** The partial services rendered by the architect had reached stage 3(iv) of the MIA Rules. The clause also provided that the architect's fees should be two-thirds of the appropriate percentage due on the estimated cost of such works. In the absence of an express agreement to the contrary, the test to be applied in determining the abandonment fee is the stage of work that has been completed by the architect.

**[4]** The computation of the abandonment fees must be based on P32 and not D45. The words "the estimated costs of such works" as provided in Clause 3(iv) of the MIA Rules in the circumstances referred to P32. The architect had no knowledge of D45. Further, the revised estimate D45 was self-induced in that it was prepared by the same quantity surveyors on the instructions of Udachin after the relationship between Udachin and the architect had become strained.

**[5]** No deductions needed to be made from P32 in the computation of the abandonment fee. The exclusion clause in P14 excluding certain fees and charges from being included in the determination of the tendered contract price for the purpose of computing the architect's fee, was not applicable, as the fees were not based on the tendered contract price but on the quantity surveyors' estimates.

**[6]** In the circumstances of the case, the sum awarded by the trial Judge was neither excessive nor unreasonable.

*[Appeal dismissed.]*

**Cases referred to:**
*K.C. Lim & Associates Sdn. Bhd. v. Pembenaan Udarama Sdn. Bhd. [1980] 2 MLJ 26*
*Stovin-Bradford v. Volpoint Properties Ltd. (CA) [1971] 3 WLR 256*
*Soon Nam Co. Ltd. v. Archynamics Architects [1979] 1 MLJ 212*

*For the appellant - Y.M. Raja Abdul Aziz Addruse; M/s. Cheang, Lee & Ong*
*For the respondent - G. Krishnan; M/s. Krishnan & Co.*

**JUDGMENT**

**Mohd Azmi FJ:**

By a specially indorsed writ dated 15 March 1977, Datuk Eric Taylor, a chartered architect and sole proprietor of an architect firm practising as Eric Taylor dan Rakan-Rakan claimed against his client, Udachin Development Sdn. Bhd. ("Udachin" for short), the sum of RM687,500 as abandonment fee for professional services rendered in respect of Wisma Chinda project at Lot No. 59, Section 57, Jalan Raja Chulan, Kuala Lumpur. The sum claimed took into account fees already paid by Udachin totalling RM190,000. In the alternative, he also claimed for the said sum upon a *quantum meruit* for work done. As a result of his death before the hearing of the case, the further conduct of the suit was by order of Court dated 14 February 1979 given to his widow Datin Peggy Taylor as personal representative of his estate. On 22 September 1983, Vohrah J gave judgment for the sum of RM685,622.50 which he later amended due to miscalculation to RM685,747.50 in favour of the estate of the deceased (the architect) and the present appeal is against the said award.

The incontrovertible evidence shows that the architect had been associated with the development of the relevant land since 1964, but due to uncertainty on the part of the owners as to the type of development to be undertaken and the constant transformation of the proprietors from one entity to another, it was not until about ten years later *vide* letter dated 29 October 1974 (Exh. P14) that the architect's appointment was finally confirmed by Udachin

in the construction of Wisma Chinda, a 28-storey commercial and residential complex. The main structure of the project consisted of a podium and a tower block. According to the fifth revised cost estimate (Exh. P32) dated 20 January 1975, the whole project would cost RM35.029 million, but the seventh revised cost estimate (Exh. D45) dated 12 January 1976 showed that the estimated cost would come down to RM25.457 million as a result of trimmings instructed by Udachin to reduce costs. Both P32 and D45 were prepared by Messrs Bridgewater, Coulton dan Rakan-Rakan, a firm of quantity surveyors employed by Udachin. The learned Trial Judge adopted P32 in preference to D45 as the basis of computing the full fee due to the architect, and the judgment sum was arrived at on the basis of 2/3rd of 3¾% of the estimated cost provided in P32. The calculation of the amended award must therefore be as follows:

| | | |
|---|---|---|
| 1. Estimated total cost of Project (P32) | ... | RM35,029,900.00 |
| 2. Full fee at 3¾% of estimated total cost | ... | 1,313,621.25 |
| 3. Abandonment fee at 2/3rd of 3¾% of estimated cost | ... | 875,747.50 |
| 4. To payment on account | ... | 190,000.00 |
| Balance due | ... | RM 685,747.50 |

The area of conflict in the Court below was rather wide both as to liability and quantum. There was denial by Udachin that the architectural work claimed to have been done was in fact rendered, and there was also dispute that there was an abandonment of the project so as to entitle the architect to abandonment fee (see in particular paragraphs 2 and 6 of statement of defence). But before us, partial services rendered and liability to pay for such services as abandonment fee are no longer in issue. It is now conceded that the respondent is entitled to remuneration on the basis that the project had been abandoned. The applicability of the Conditions of Engagement and Scale of Professional Charges prepared by the Malaysian Institute of Architects (MIA) also known as Pertubuhan Akitek Malaysia (PAM) in computing the abandonment fee is also no longer challenged, and as such the letter Exhibit P14 read in conjunction with MIA scale of charges Exhibit P50 should be the basis for the calculation of the full fee, and that the partial remuneration or abandonment fee should be at 2/3rd of the full fee which is 3¾% of the total estimated cost of the project, are now accepted as correct. It is therefore common ground that for the purpose of ascertaining the architect's partial remuneration, MIA or PAM Rules should be applied to P14 i.e. the parties now agree that in view of the abandonment, their contract is subject to MIA Rules (Exh. P50) although members of MIA are not bound by the scale of fees provided under those Rules. In the circumstances, it is unnecessary for us to reproduce the entire arguments canvassed in the Court below. Nor do we propose to reproduce the full facts of the case which in any event have been fully set out in the grounds of judgment of the learned Judge. As contained in the memorandum of appeal, Udachin is dissatisfied with the decision of the learned Judge merely on the computation of the full fee. The argument before us revolves mainly on whether the date of abandonment was 27 November 1975 as found by the learned Judge or February, 1976 as contended by Udachin. Apparently the abandonment date was and is considered as sacrosanct by all concerned for the determination of whether the estimate P32 or D45 should apply in the computation of remuneration for the partial services rendered by the architect, resulting in considerable time and energy being consumed in resolving this particular issue both here and the Court below. At this juncture it may be convenient to reproduce the two documents relevant for the proper appreciation of the present dispute. The first is Exhibit P14; the letter from Udachin confirming the appointment of the architect and setting out the agreed professional fees:

Date: 29 October 1974

Datuk Eric Taylor,
M/s Eric Taylor & Partners,
11D, Jalan Parry,
**Kuala Lumpur 04-04**

Dear Datuk:

**re: Wisma Chinda**

We hereby confirm your appointment as our Project's Architects.

As agreed upon your total fees shall be based on 3¾% (Three and three quarter percentum) of the final Quantity Surveyors' Estimates accepted by us or the Tendered Contract Price, whichever is the lower. Variations, Consultant fees, Development charges contribution, and other payments of similar nature, shall not be considered in the determination of such price.

As regards scheme of payment, our Board has decided on RM20,000 per month commencing from November 1974. This scheme of payment shall be reviewed and amended as and when necessary due to changes in schedule of construction progress of work and other factors relating to the project.

Enclosed is our cheque of RM20,000 being payment as referred to above.

Yours faithfully,
Sgd. George Chin.

The second relevant document is the Progress Report Exh. P18 submitted by the architect at the request of Udachin which unfortunately is not included in the appeal record:

604/75
27 November 1975
M/s. Udachin Development Sdn. Bhd.,
78, Jalan Raja Chulan,
Kuala Lumpur.

**Attn: Mr. George Chin**

Dear Sir,

**Wisma Chinda Project, Kuala Lumpur**

In reply to your letter of 22 November 1975, we submit herewith a progress report of our works completed to-date.

**A. Application for planning approval**
A total of 3 schemes into scale have been prepared and submitted to the Town Planning Committee (TPC) for consideration. The first two submissions were rejected due to plot ratio problem. The last scheme with a reduced plot ratio of 5.17 to 1 was finally approved by TPC. (reference of drawings submitted to TPC: 74ETP6/S/1b-16b)

**B. Brochure drawings**
Drawings for brochure production have been prepared on tracing papers in 1/16 scale. (reference of drawings: 74ETP6/B 1-15)

**C. Site and sales office**
Working drawings in 1/8 scale have been prepared and submitted to Akitek Bandaraya. As soon as building approval being granted, contract documents were prepared for calling of tenders. The site and sales office was erected by M/s Azman Sdn. Bhd., the successful contractor, in June 1975. (reference of drawings: 74ETP6/17-29)

**D.Working drawings**

All working drawings in 1/8 scale have been completed and ready for submission to the Akitek Bandaraya for building approval subject to your instructions. Most of the major details have also been prepared and issued together with the working drawings to the Quantity Surveyor for his preparation of the Bills of Quantities. Below is a list of working and detail drawings completed.

| Drawing No: | | Drawings: |
|---|---|---|
| 74ETP6/WD/1 | | Site Plan |
| Ditto | 2 | Basement 4/3a |
| Ditto | 3 | Basement 3/2a |
| Ditto | 4 | Basement 2/1a |
| Ditto | 5 | Basement 1 and ground floor |
| Ditto | 6 | 1st floor |
| Ditto | 7 | 2nd floor |
| Ditto | 8 | 3rd floor |
| Ditto | 9 | 4th floor |
| Ditto | 10 | 5th floor |
| Ditto | 11 | 6th and 7th floor |
| Ditto | 12 | 8th to 17th floor |
| Ditto | 13 | 18th to 21st floor & Penthouse (22nd floor) |
| Ditto | 14 | Roof plan |
| Ditto | 15 | Section A-A |
| Ditto | 16 | Section A-A |
| Ditto | 17 | Section B-B |
| Ditto | 18 | South elevation |
| Ditto | 19 | North elevation |
| Ditto | 20 | West elevation |
| Ditto | 21 | East elevation |
| Ditto | 22 | Elevation of roof and a/c plant room |
| Ditto | 23 | Petrol interceptor |
| Ditto | 24 | (Detail drawings) - Details of Shear walls |
| Ditto | 25 | Details of Shear walls |
| Ditto | 26 | Details of main staircase |
| Ditto | 27 | Details of fire and exit staircase |
| Ditto | 28 | Details of basement staircase |
| Ditto | 29 | Toilet layout - 1st-4th floor, 6th-21st floor |
| Ditto | 30 | Toilet layout |
| Ditto | 31 | Toilet layout - Penthouse |
| Ditto | 32 | Door schedule |
| Ditto | 33 | Section of doors |
| Ditto | 34 | Door details |
| Ditto | 35 | Door details (Penthouse) |
| Ditto | 36 | Details of external walls |
| Ditto | 37 | Details of external walls |
| Ditto | 38 | Details of r.c. canopies |
| Ditto | 39 | Sections of projected basements |
| Ditto | 40 | Ceiling layout - ground floor |
| Ditto | 41 | Ceiling layout - 1st floor |
| Ditto | 42 | Ceiling layout - 2nd & 3rd floor |
| Ditto | 43 | Ceiling layout - 4th floor |
| Ditto | 44 | Ceiling layout - 5th floor |
| Ditto | 45 | Ceiling layout - 6th to 11th floor |

> We have been recently requested by other consultants to convene a joint meeting with the owners in order to work out a possible and definite programme of works for the consultants. If you could suggest a date for such a meeting, we would be pleased to convey the message to the other consultants.
>
> Yours faithfully,
> Sgd: Dato Eric Taylor
>
> c.c.
> Encik Kassim Sotin,
> Perbadanan Pembangunan Bandar,
> 126, Jalan Bukit Bintang,
> P.O. Box 80,
> Kuala Lumpur.

Dealing with grounds one and two of the memorandum of appeal it is submitted on behalf of Udachin that the learned trial Judge was wrong in holding that the abandonment fee should be calculated by reference to the estimated cost of the project in Exhibit P32, and on the basis of the agreement relating to fees reached between Udachin and the architect as contained in Exhibit P14, the learned Judge ought to have adopted the estimated cost of the project in Exhibit D45 instead of Exhibit P32. The difference in the total estimated cost between P32 and D45 is about RM9.57 million. If D45 had been adopted as the basis of the total cost of the project, the abandonment fee payable would be lower than what had been awarded as can be shown in the following calculation:-

| | | |
|---|---|---|
| 1. Estimated total cost of project (D45) | ... | RM25,457,400 |
| 2. 3¾% of total cost of project | ... | 954,660 |
| 3. 2/3rd of total fee | ... | 636,440 |
| 4. Less payment on account | ... | 190,000 |
| Balance due | ... | RM 446,440 |

It must therefore be the case for the appellant that judgment should be entered for the architect in the sum of RM446,440 and not RM685,747.50.

In adopting P32 as the estimated total cost of the project the learned Judge appeared to have been greatly influenced by two factors. Firstly, D45 came into being after the date of abandonment which he found to be 27 November 1975 and as such it could not be applied. Secondly, as far as the architect was concerned he had no knowledge of D45 and therefore he could not be bound by it. On the issue of the date of abandonment, the learned Judge held at p. 12 of his judgment:

> I am satisfied that the architect ceased carrying out his professional duties after submitting, at the request of Udachin, the progress report P18 (dated 27 November 1975) when it evoked no response from Udachin either in the form of the continuing payment of fees by instalment or the convening of the joint meeting of the consultants engaged in the project asked for by the architect ostensibly at the instance of the other consultants. I am also satisfied that up to 8 December 1976 when the plaintiff wrote P20 to Udachin she was claiming on behalf of the architect his fees up to and including December 1976 in the sum of RM330,000. It was only when the solicitors' letter P25 dated 27 December 1976 was sent that the architect had construed the non-response from Udachin as constituting abandonment of the project on its part. I accept the evidence of the plaintiff that there was no reply from Udachin to P18 or any communication whatsoever from that quarter resulting in the plaintiff having to go and meet the Chairman of Uda for his intervention in the matter. I also accept PW4's evidence that there was no meeting because if there had been one with the architect he would surely

> have known of it having been the architect directly in charge of the project. DW1's manner however was equivocal. He merely stated that he remembered that he and his father met the architect some time in December 1975. I could not help thinking this piece of the evidence was self-serving and not reliable. I therefore find as a fact that there was actually a breakdown in communication between the architect and Udachin despite his instruction of PW4 to remind Udachin to renew the development order for the project for such instruction as I have said, would, in my view, be forthcoming from any responsible architect even in circumstances such as these where relations between the architect and his client must have been strained. Certainly by the time the architect left Kuala Lumpur on 31 October 1976 for medical treatment in London there was no activity at all on the project and there was already an intention on his part evidenced by P30 to claim for non-payment of fees as he must have considered that the failure to pay the instalments as prescribed in P14 constituted a repudiatory breach of the terms of his letter of appointment.

In our view the learned Judge's findings are contradictory. Whilst satisfied that the architect ceased rendering professional services to Udachin on 27 November 1975, he seemed equally satisfied that the architect's fee was correctly claimed up to and including December 1976 in the sum of RM330,000 based on the scheme of payment in P14. If services were rendered up to and including December 1976 as evidenced by Exhibit P20, how could it be said that the architect completely ceased carrying out his professional duties on 27 November 1975 - the date of submission of the Progress Report (P18)? Similarly, since the architect himself had construed the non-response from Udachin to his solicitors' letter P25 dated 17 December 1976 as constituting abandonment of the project, it is difficult to comprehend how it could be argued in the same breath that the abandonment must occur in November 1975. The finding of the learned Judge as to the date of abandonment is contradictory by his own conclusions on the evidence. In fact the last paragraph of P18 indicated that there was still genuine hope on the part of the architect that the project would proceed as planned. It was in evidence also that the Development Order of the project was renewed by the architect in 1976 notwithstanding the explanation offered by the learned Judge that this particular professional service was done out of a sense of responsibility by the architect in respect of instruction given in 1975. From the entire evidence it seems clear that the architect continued to give professional services in 1976, although the extent and nature of such services could not be as substantial as those rendered up to 27 November 1975 as clearly shown in the Progress Report P18, the contents of which were never seriously contested.

As regards knowledge of D45 by the architect, the learned Judge had this to say at p. 21 of his judgment:

> I am of the view that P32 must be used as the basis for the quantity surveyors' estimate as that was the last cost estimate which the architect had knowledge of at the time he ceased work on the project and from which he wrote out the figure in P30.

Udachin's response to this is that the employee of the architect firm Mr. Wong Yuen Kee (PW4) knew of D45 and as such knowledge of the agent must be imputed to the architect.

It is the contention of learned Counsel for Udachin that since the date of abandonment was not in November 1975 but in 1976, exhibit D45 the 1976 quantity surveyors' estimate ought to have been adopted in computing the total fee instead of P32 for the purpose of the agreement in P14. But as correctly remarked by the learned Judge, P14 never envisaged an abandonment situation. We note that there is nothing in P14 to provide how the architect's fee is to be computed in the event of abandonment. P14 specifically refers to the "final quantity surveyors' estimates". In view of the abandonment, naturally there can be no such final

estimates. In our view neither P32 nor D45 can be treated as the "final quantity surveyors' estimates" of the project for the purpose of P14. We are therefore in agreement with the learned Judge's conclusion, as now conceded by Counsel for Udachin, that Clause 3 of MIA Rules should be imported into P14 for the purpose of computing abandonment fee. That being the case the date of abandonment is not really as relevant and vital as it was made out to be by Counsel for both parties and as well as by the learned Judge for the determination of the present dispute. What is important for the purpose of ascertaining the partial remuneration or abandonment fee of the architect is the actual measure of partial work that had been carried out by him for Udachin in the building project. Clauses 3(iv) and 3(viii) of MIA Rules are in the following terms:

3. MODE AND TIME OF PAYMENT AND PARTIAL SERVICES

The architect is entitled to payment in stages as follows and in cases where the architect performs partial services for any reason, including the abandonment, deferment, substitution or omission of any project and/or works, or part thereof, or if the services of the architect are terminated, the fees in-respect of the services performed shall be as follows:-

(i) xx xx

(ii) xx xx

(iii) xx xx

(iv) For taking client's instructions, preparing sketch designs, making approximate estimate of cost by cubic measurement or otherwise, and preparing working drawings, specification, or such other particulars as may be necessary for the preparation of bills of quantities by an independent quantity surveyor, or for the purpose of obtaining tenders, the fee shall be two-thirds of the appropriate percentage due on the estimated cost of such works.

(v) xx xx

(vi) xx xx

(vii) xx xx

(viii) In cases where the architect performs partial services for any reason including the abandonment, deferment, substitution or part thereof, or if the services of the architect are terminated, the fees in respect of the services performed shall be as set down for the various stages of work as set out above.

Thus, Clause 3 refers to the fees in respect of services performed. Under Clause 3 (iv), the architect's fee "shall be two-thirds of the appropriate percentage due on the estimated cost of such works". In the absence of express agreement to the contrary, the test to be applied in determining abandonment fee is the stage of work that has been completed by the architect. Before us the parties have agreed that the remuneration should be 2/3rd of the total fee payable. In the context of Clause 3 of MIA Rules, they have therefore conceded that works done by the architect had reached the stage of Clause 3 (iv). Indeed the evidence of Mr. Graham Moffat (PW6) a representative of Pertubuhan Akitek Malaysia (PAM) and who at the time of hearing was also the chairman of its Practice Committee, was rightly given weight by the learned trial Judge. Mr. Mofatt's examination in Court of 26 of the working and detailed drawings of the architect led him to the view that the architect had done enough work to provide sufficient information for the quantity surveyors to prepare their bill of quantities from which to form the basis for the calling of tenders for the purpose of going into construction. According to him the practice was that an architect could treat a project as abandoned if after submitting the plans, as the architect had done in this case, no instructions were forthcoming from the client after a period of 3 months from the date of submission in which event he would be entitled to two-thirds of the full fee provided for under his contract of engagement. In his view, even if there had been no abandonment the architect would still

be entitled to the same amount for the work he had put in. In our view, paragraph D of the Progress Report P18 and the evidence of Mr. Moffat have clearly proved on balance that the partial services rendered by the architect had indeed reached stage 3 (iv) of MIA Rules. The evidence of Encik Wan Mokhtar bin Abdullah (PW5), a quantity surveyor from Messrs Bridgewater, Coulton dan Rakan-Rakan was also considered by the learned Judge. In his judgment, the learned Judge referred to PW5's explanation that "the cost estimate as such represents the bill of quantities which is used as a tender document to enable the contractor to price the cost of a building project. He stated that his consulting quantity surveyors stopped work on the project in November 1975 after they had received all the plans from the architect necessary to put up the cost estimate P32 which was prepared in January 1975. They could not continue to work and complete the documents for tender because Udachin intimated to them in July 1977 that plans had to be revised by the architect and the consulting structural engineers as new fire legislation required such revision but this intimation, be it noted, was only given to them nearly two years after they had themselves stopped work on the bill of quantities for the project. From the evidence of PW5 and PW6, it is our view that the architect had on taking Udachin's instruction, prepared 45 designs, working drawings etc. as shown in the Progress Report P18 for the preparation of bill of quantities by Messrs Bridgewater, Coulton dan Rakan-Rakan. All these works were done by the end of 1975 and they were sufficient to enable the quantity surveyors to prepare their bill of quantities with a view to calling for tenders. In other words, the services rendered by the architect up to stage Clause 3 (iv) of MIA Rules were based on the 1975 cost estimate (P32) and not on the 1976 cost estimate (D45) which only came into existence on 12 January 1976. Indeed, the architect had no knowledge of D45 when he was requested by Udachin to prepare the Progress Report P18 pursuant to Udachin's failure to pay him the monthly fee of RM20,000. All the works done by him were on the basis of the fourth revised estimate P32. In *K.C. Lim & Associates Sdn. Bhd. v. Pembenaan Udarama Sdn. Bhd.* [1980] 2 MLJ 26, the building project was abandoned by the developers because of an appreciation that the project was not viable or profitable after a reappraisal in the light of current trends and developments of the property and construction market. The architects, as in the present appeal, were found free from any liability or blame for the abandonment. It was held that the trial Judge was wrong in turning down the architect's O. 14 application for judgment of RM1.6 million being their fees for the stages that they had completed. But one distinction is that in that case the cost of construction in August 1973 was about RM30 million but in November 1974 it skyrocketed to RM40.6 million. There this Court took judicial notice of the fact that from 1973, following the Arab embargo on oil production inflation had set-in in Malaysia and as well as the rest of the world. Whereas in the appeal before us the seventh revised estimate D45 purporting to bring down the estimated costs from RM35 million to RM25.4 million was self-induced in that D45 was prepared by the quantity surveyors on the specific instruction of Udachin to reduce costs after the relationship between Udachin and the architect had become strained and legal action already threatened by the architect. Exhibit D45 itself is not a fraudulent document but being self-induced it should have no effect on the estimated costs of work on which the architect's services were based as envisaged in Clause 3(iv) of MIA Rules. By subsequently trimming the project, Udachin cannot in an abandonment situation reduce the remuneration payable to the architect for the considerable work which he had already rendered as shown in the Progress Report P18. Indeed, the only way how the abandonment fee is to be reduced, is for Udachin to challenge the stage of work completed and prove that the extent of partial services claimed to have been rendered by the architect was untrue or manifestly exaggerated. Alternatively it should be shown that the services

rendered were not based on P32. This has not been done to our satisfaction. In the circumstances, the words "the estimated costs of such works" as provided in Clause 3(iv) of PAM or MIA Rules must in this particular case refer to P32 and not D45.

The next argument of the appellant is that even if P32 was the correct estimated costs to be adopted in computing the total costs, the learned Judge failed to consider that the estimated RM35.029 million included consultancy and other charges and payments totalling RM6.9 million which by virtue of the terms stated in Exhibit P14 should not be taken into account for the purpose of calculating the abandonment fee payable to the architect. From Exhibit P14, it is agreed that the architect's total fee should be based on 3¾% of either the final quantity surveyor's estimate or the tendered contract price, whichever is the lower. This is followed by the exclusion clause which provides, "that variations, consultant fees, development charges, contributions and other payments of similar nature shall not be considered in the determination of such price". Taking the natural and ordinary meaning of the words "such price", it seems abundantly clear to us that the exclusion clause could only apply if the total fee were based on the tendered contract price. There is no justification in extending the meaning of "such price" to fees based on quantity surveyor's estimates. There is certainly a world of difference between 'price' and 'estimate'. If such were the intention of the parties then the words employed would have been "such estimate or price", or words to that effect. We therefore agree with the learned Judge in not making any deduction in respect of consultant fees and other similar charges from P32 in computing the abandonment fee or remuneration payable for partial services rendered by the architect.

The final point advanced by the appellant in the memorandum of appeal is that the sum awarded by the learned Judge by way of abandonment fee is manifestly excessive and unreasonable. The whole circumstances of this case must be taken into account in order to determine the reasonableness of the award. It cannot be challenged that the whole dispute was triggered by Udachin's failure to pay the architect his fee of RM20,000 per month. Under the scheme of payment as agreed in Exhibit P14, although the scheme could be varied and amended as and when necessary due to changes in the schedule of construction, progress of work and other factors relating to the project, in our view it is not open to Udachin to stop making payment altogether unilaterally. There was no problem for the first nine months i.e. November 1974 to July 1975, but for the month of August 1975 the architect received only RM10,000 and thereafter he received no further payments. In the words of the learned Judge:

> On 6 November 1975 the architect then wrote the letter P16 to Udachin in which he expressed regret for the cessation of the instalment payments towards his professional fees and intimated that he would stop all his technical meetings, his dealings with the other consultants, his work on the working drawings for the project and also that he would have to retrench staff on the ground that he could not afford to carry on his business without his fees being paid. On 22 November 1975 George Chin on behalf of Udachin replied to the architect that the partners of Udachin had discussed the contents of P16 and that it was decided that the architect should submit a progress report of the work done by him 'to date in order for us to review the situation' (see P17). On 27 November 1975 the architect submitted his progress report (see P18) and requested the fixing of a date by Udachin for the purpose of having a meeting of the consultants engaged in the project 'in order to work out a possible and definite programme of works for the consultants'. There was no reply to P18 and no further instalment payments were made to the architect by Udachin. The architect fell ill about this time and was recommended to return to England for medical treatment which he did on 31 October 1976. On 1 November 1976 the architect's senior assistant, Wong Yuen Kee (PW4), on the instruction of Udachin successfully applied for the extension of the development order (see

P12) from the Planning Officer of Dewan Bandaraya (see P22, P23, P24 and D43). During the architect's absence from Malaysia the plaintiff was his duly appointed attorney (see P19) and, acting on the architect's instructions transmitted from time to time by telephone, the plaintiff sought legal advice and sent the letter P20 dated 8 December 1976 requesting payment of RM330,000,00 as outstanding fees from the time of short payment in August 1975 up to and including December 1976 at the rate of RM20,000,00 per month as stipulated in paragraph 3 of P14. This letter was signed on behalf of 'Eric Taylor Dan Rakan-Rakan'. On 13 December 1976 DW1 acting on behalf of Udachin replied by letter P21 intimating that the payment of fees had been negotiated directly with the architect and drawing attention to the second sentence of paragraph 3 of P14 where it was stipulated that the scheme of payment by instalment of RM20,000 per month 'shall be reviewed and amended as and when necessary due to changes in schedule of construction progress of work and other factors relating to the project'. There was also a request by Udachin for a meeting with the architect for confirmation of the basis of payment (at a time when the architect was out of the country). Then on the instruction of the architect who was still in London the plaintiff caused a firm of solicitors to send a notice of demand dated 17 December 1976 (see P25) for the sum of RM751,600 stated to be the balance of the fees for abandonment of the project by Udachin after taking into account the sum of RM190,000 which the architect had received for the period November 1974 to August 1975 under the scheme of payment stipulated in P14.

We agree with the learned Judge's conclusion that Udachin was obviously dragging its feet with regard to the payment of the architect's fees. Udachin's request in Exhibit P17 for the architect to submit a Progress Report of the work done by him was clearly an attempt to play for time, because when the 'Progress Report was submitted by the architect on 27 November 1975, nothing came out of it. We also agree with the learned Judge's finding that in view of PW3's evidence, Udachin was at the material time suffering from a lack of available funds giving rise to the inference that even if it had wanted to pay the architect it did not have the finance to do so. The abandonment was entirely due to Udachin's breach of the contract and instead of admitting its financial problem to the architect, it went on to lead him on a merry-go-round until the architect had no more alternative but to threaten it with legal action. In view of Udachin's appalling inertia as a paymaster and the stage of work completed, we do not consider that the sum awarded is excessive or unreasonable. The award represented about 34 months' fees at RM20,000 per month under the scheme of payment for a building project estimated to cost RM35 million. If there had been no breach triggering the abandonment, the architect would have earned more than RM1 million in professional fees under P14. He was an experienced architect of many years' standing. A considerable amount of work had been done by him particularly from 29 October 1974 to 27 November 1975. The services rendered by the architect had gone beyond the stage of obtaining planning permission. In fact it had almost reached the stage of obtaining tenders as he had prepared all the working drawings and specification sufficient to put before the contractors to enable them to tender a price. The numerous working and detailed drawings prepared by the architect had provided sufficient information for the preparation of bills of quantities from which to form the basis for the calling of tender. The 3¾% fee agreed to in P14 was well below the 7½% guideline provided by MIA scale of fees. In the result, we do not consider the award made by the learned Judge excessive or unreasonable. As stated by Lord Denning in *Stovin-Bradford v. Volpoint Properties Ltd.* (CA) [1971] 3 WLR 256 @ 262 there are four stages in the work of an architect where he is engaged right through from beginning to completion. The first stage is for the architect to prepare a preliminary design sufficient to append to an application for outline planning permission. The second stage is to prepare a final design sufficient to append to an application for detailed planning permission and for approval under the building regulations. The third stage is for the architect to prepare working drawings

and a specification sufficient to put before contractors to enable them to tender a price. The final stage is to obtain tenders and advise on them, to arrange for the contract, to supervise the work, to issue certificates, and to administer the work until the work is completed. These four stages are also applicable in this country. Thus, Chang Min Tat FJ in *K.C. Lim & Associates Sdn. v. Pembenaan Udarama Sdn. Bhd. (ante)* referred to them as (a) the preliminary design stage, (b) building by-law application stage, (c) preparation of tender stage and finally (d) supervision stage.

In this appeal the appellant having conceded that the architect was entitled to remuneration for partial services rendered to be calculated at 2/3rd. of 3¾% of the estimated total costs of the project, has impliedly agreed that the architect had performed work up to stage (iv) in cl. 3 of the Malaysian Institute of Architects scale for professional charges. Although the MIA scale provides for 7½ % of total fee, the parties had by agreement in P14 fixed the total fee at only 3¾%. In normal circumstances, once the liability to pay for the partial work is admitted and the extent of the partial work is agreed, there would be no problem in ascertaining the quantum of partial remuneration payable to the architect. Further, as the partial work performed by the architect was clearly based on the fifth revised estimate P32, there should be no difficulty in ascertaining the remuneration on the basis of 2/3rd of 3¾% "on the estimated cost of such works" as envisaged in Clause 3(iv) of MIA scale. But Udachin now says D45 produced in January 1976 and not P32 is the relevant estimated cost that should be adopted. For reasons which we have already expressed, we are unable to agree. The argument that D45 is the 'final' estimate accepted by Udachin on the strength of P14 is untenable on the ground that except for the 3¾% agreed fee, the rest of P14 relating to computation of total fees cannot be used in the present situation where only partial services had been rendered by the architect and the architect's services were withheld as a result of Udachin's failure to pay the architect RM20,000 per month in accordance with the agreed scheme of payment. The argument that D45 is applicable because the architect continued to give his services up to December 1976 and not merely up to 27 November 1975, cannot displace P32 as the *de facto* basis upon which the architect's partial services had been performed within the meaning of Clause 3 (iv) of MIA scale of professional charges. In *Soon Nam Co. Ltd. v. Archynamics Architects* [1979] 1 MLJ 212, in considering the scope of Clause 3(ii) the Singapore Institute of Architects scale of professional charges which is in *pari materia* with Malaysian Clause 3(ii) it was held for the plaintiffs/architects at p. 213:

> In our opinion the trial Judge misapplied the provisions of Clause 3(ii) of the Singapore Institute of Architects Scale of Professional Charges. 'In principle' approval is not a requirement for the application of Clause 3(ii). What is required is that the plans should be sufficient for "application to be made for planning approval and for 'in principle' approval". The plaintiffs had clearly complied with this requirement and they had in fact submitted plans for 'in principle' approval. In any case, the work done by them was in excess of that required under Clause 3(i) and by virtue of the provisions of Clause 3(viii) they were entitled to payment under Clause 3(ii) i.e. one-third of eight per cent of the estimated cost of the project. The cost of the project was estimated by the plaintiffs at RM5.7 million. This figure was not challenged at the trial. The plaintiffs are therefore entitled to RM152,000 being one-third of eight per cent of RM5.7 million.

Compared with the present appeal where the estimated cost of the project in P32 was RM35.029 million we do not think that the learned Judge's award is wholly erroneous bearing in mind that the services rendered had almost reached the tendering stage. P32 which is being challenged was prepared by Udachin's own quantity surveyors and not by the architect as

was the case in *Soon Nam Co. (ante).* The partial work performed by the architect such as detailed drawing plans were based on that estimate. We find no reason for Udachin to challenge the figures in P32. As such the learned Judge was right in adopting P32 and rejecting D45 as the basis for computing the remuneration of the architect. Having regard to all the circumstances, we are not prepared to conclude that the basis of computation of abandonment fee in the form of remuneration for partial services rendered was excessive or unfair. The award was a fair remuneration for the work done by the architect in this particular case. We find the award ought not to be disturbed. The appeal is accordingly dismissed with costs.

Also found at [1984] 2 CLJ 17